United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original w/ affidavit of Mailing

75-7081

To be argued by
PETER A. GOLDMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7081

VINCENZO BURRAFATO and
ANTONINA BURRAFATO,

Appellants,

—against—

U.S. DEPARTMENT OF STATE and
U.S. IMMIGRATION & NATURALIZATION SERVICE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

DAVID G. TRAGER,
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PETER A. GOLDMAN,
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of Counsel.

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Preliminary Statement

Appellants Vincenzo Burrafato and Antonina Burrafato, have appealed from the final judgment of the Hon. Walter Bruchhausen entered January 21, 1975, granting defendants' motion to dismiss pursuant to Rule 12(b)(5), Fed. R. Civ. P. for lack of subject matter jurisdiction.

The plaintiff-appellant Vincenzo Burrafato was found deportable as an uninspected "resident" alien by Immigration Judge Ira Fieldsteel on July 28, 1974 (8 U.S.C. § 1251, (a)(2)).[1] The administrative hearing to determine

[1] 8 U.S.C. § 1251(a)(2), provides:

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States.

Mr. Burrafato's status as a "resident" alien was brought on by the Government by an order to show cause and notice of hearing before the Immigration and Naturalization Service. Mr. Burrafato was represented by counsel at this hearing. He does not allege any irregularities with respect to the hearing, or the bases of his deportability. Moreover, at the hearing Mr. Burrafato refused to answer any questions regarding his entry into this country. The Immigration Judge found him deportable because he entered the United States of America as an uninspected alien: he was granted a voluntary departure date. Thereafter the voluntary departure date was extended by order of Judge Bruchhausen on January 28, 1975, until a final determination by this Court.

The instant action was commenced on June 5, 1975.

Issues Presented

(1) Did the Court have jurisdiction to review the foreign consul's denial of a visa?

(2) Did the Immigration Judge err or abuse his discretion in finding Vincenzo Burrafato deportable?

(3) Does Antonina Burrafato have a constitutional right to have her husband remain in the United States of America?

Facts

This action relates to the deportation of an illegal alien presently living in this country and who entered this country surreptitiously after having been denied a visa by the American Consul in Palermo, Italy. This action does not allege that Burrafato is not deportable as an uninspected alien pursuant to 8 U.S.C. § 1251.

In February, 1970 Mr. Burrafato applied to the American Consul, Palermo, Italy, for a permanent immigration visa to America. His application was denied by the Consul, wherein Mr. Burrafato was notified that he was not eligible for a visa pursuant to 8 U.S.C. § 1182(a) 27.[2]

In spite of the Consul's ruling, sometime in 1970 or 1971 Mr. Burrafato entered this country illegally, at an undisclosed location.

Mr. Burrafato remained in this country without the knowledge of the Immigration authorities until he was finally served with an order to show cause and notice of hearing on December 7, 1972 calling for his deportation. Mr. Burrafato, after receiving a full due process administrative hearing in which he was represented by counsel, was found to be deportable as an uninspected alien (8 U.S.C. § 1251), as alleged in the order to show cause and notice of hearing. Throughout the hearing Mr. Burrafato refused to answer any questions regarding his unexplained entry into this country.

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[2] §1182. Excludable aliens—General classes

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;

ARGUMENT

POINT I

The District Court did not have jurisdiction over the subject matter of this action.

It is black letter law that the Courts are without authority to review decisions by Foreign Consuls in denying visas. Not only is there no statutory authority for such review, but the case law is replete with holdings and dictum refusing such judicial review.

> Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of Due Process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the Legislative and Judicial Tissues of our body politic as any aspect of our government. We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our Constitutional system recognize congressional power in dealing with aliens. *Galvan* v. *Press*, 347 U.S. 522, 531-532 (1954).[3]

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[3] *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547 (1895) has long been the law.

"The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country and to have its

[Footnote continued on following page]

Confronted with this, plaintiff attempted to circumvent these obstacles by instituting this action against the Department of State and Immigration and Naturalization Service. (It should be noted here that there are no allegations of abuse of discretion or error of law by the Immigration and Naturalization Service).

In sum and substance, the allegations are to the effect that the Department of State did not follow 22 CFR § 42.130, in particular, subsection (c). However, even with respect to the allegations directed at the Department of State, the record is void of any evidence that subsection (c) was not followed, other than arguably the letter from the Department of State to Mr. Sisk, apparently Mr. Burrafato's then attorney. (See joint appendix, pg. 35).

Title 8 U.S.C. § 1201, provides that a non-resident alien may apply for a visa to become a resident immigrant through the Foreign Consul. The decision to issue such

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declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." See also *Kleindienst* v. *Mendel*, 408 U.S. 753 (1972); *Noel* v. *Chapman*, Dkt. # 74-1447 (2d Cir. 1975).

More relevant however is Judge Swan's statement, "unjustifiable refusal to visa a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. It is beyond the jurisdiction of the court." *United States* v. *Phelps*, 22 F.2d 288, 290 (2d Cir. 1929).

The basis of non-review ability of a United States Foreign Consulate's denial of an immigration visa is clearly stated in *Licea-Gomez* v. *Pilliod*, 193 F. Supp. 577-582 (N.D. Ill. 1960):

> To allow plaintiff a hearing and adjudication on his eligibility for citizenship [by the courts] would completely circumvent the provisions of the Immigration and Nationality Act * * * granting *exclusively to consuls* the right to issue visas. Such a hearing would mean that everyone denied a visa by a consul could present himself at the border [or court] without a visa and get an adjudication on his status (emphasis added).

visa is within the sole discretion of the foreign Consulate, and while there are provisions which permit the Department of State to review a visa denied by the Consul, the Secretary of State does not have the power or authority to reverse the Consul's decision. 22 CFR § 42.130; *United States* v. *Kellogg*, 30 F.2d 984 (D.C. Cir. 1929).

Subsection (c) of 22 CFR § 42.130, provides that the Department of State *may* request a consular officer to review the decision on the denial of the visa. The language is clearly not mandatory.

> (c) *Review of refusals by the Department.* The Department *may* request a consular officer in an individual case or in specified classes of cases to submit a report if an immigrant visa has been refused. The Department will review such reports and may furnish an advisory opinion to the consular officer for his assistance in giving further consideration to such cases. If upon the receipt of the Department's *advisory opinion* the consular officer contemplates taking action contrary to the advisory opinion, the case shall be resubmitted to the Department with an explanation of the proposed action. Rulings of the Department concerning an interpretation of law, as distinguished from an application of the law to the facts, shall be binding upon consular officers. (emphasis added).

It is clear, the Department of State will only review the Consul's report and then may furnish an advisory opinion. Additionally, the Consul is bound only by "Rulings of the Department of State concerning an interpretation of law, as distinguished from an application of the law to the facts". 22 CFR § 42.130(c).

As noted, the record is void with respect to any review by the Department of State of the Consul's initial determin-

ation to deny Mr. Burrafato a visa, no less any rulings regarding interpretation of law.

The only spark of evidence in support of the appellant's allegations is the undated letter from the Department of State to Mr. Sisk, *supra*. This particular letter appears to have been sent upon request of appellant's attorney long after Mr. Burrafato's visa was denied,[4] and consequently also would not lie in the purview of 22 CFR § 42.130(c) as 22 CFR § 42.130(c) relates only to communication between the Consul and the Department of State, and the Department of State's interpretation of the law.

Moreover, an attack upon the letter is also without substance, as Title 8 U.S.C. § 1202(f) provides statutory support for the position stated in the letter:

> Confidential nature of records
>
> (f) The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States, except that in the discretion of the Secretary of State certified copies of such records may be made available to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court.[5]

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[4] Burrafato was apparently in this country by the time the State Department's letter was received.

[5] It should be noted that this particular section is not covered by the freedom of information act. Feb. 19, 1975 Fed. Regist. Vol. No. 40, No. 34 22 Foreign Relations § 6.4(a)(3).

Moreover, Judge Bartels in his dissent in *Mandel*, *infra* pointed out that there is clearly a need for confidentiality where the Foreign Consul is concerned. *Mandel* v. *Mitchell*, 325 F. Supp. 620 (E.D.N.Y. 1971); *rev'd sub nom Kliendienst* v. *Mandel*, 408 U.S. 753 (1972).

> Frequently his decision to deny a visa is predicated upon confidential information, the disclosure of the sources of which might endanger the public security. (at 648).

Finally, appellants allege that Title 8 U.S.C. § 1182(a)(27) is not applicable to "association with organized criminal society", but only political subversives. Subsection (27) provides that any:

> "alien who the *consular officer* or the Attorney General knows or has reason to believe seeks to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; . . ." (emphasis added).

Clearly this section was designed to give the Foreign Consul discretion, where an alien who was applying for a visa did not fit exactly within one of the other specific sections. For the plaintiff to allege that it would cover only "political" situations is without merit, as sections 28 and 29 clearly fulfill that legislative mandate regarding subversive or political activities. Moreover, as has been affirmed time after time, Congress has the ultimate authority to refuse entry into this country of aliens, whatever their reasons. See *Kleindienst* v. *Mandel*, *supra*, and cases cited therein.

The plaintiff also argues that the unreported *McDonald* case supports their position. *McDonald* v. *Kleindienst*, 72 Civ. 1228 (S.D.N.Y. 1972).[6]

In *McDonald* #1, an action was commenced to declare unconstitutional § 1182(a)(28), Title 8 U.S.C., and to have a visa issued to a Cuban film maker. The denial of the visa was made without apparent justification. Plaintiffs in the *McDonald* #1 case, in addition, were several American citizens alleging, as in *Mandel*, *supra*, violation of First Amendment Rights.

The Court, noting *Mandel*, *supra*, stated that "a denial of a waiver without any justification, does not satisfy the requirements of *Mandel*" (at 5). Consequently, the Secretary of State was required to justify the reason for the denial of the waiver.

It should be noted here, that as a non-resident alien, Burrafato had no constitutional right to enter this country, or other constitutional rights that needed protection, nor does he allege such. The allegation that his wife's constitutional rights are being violated is equally without merit, *infra*. *Noel* v. *Chapman*, Dkt. #74-1447 (2d Cir. 1975); see also *Mandel*, *supra*.

Subsequent to the Secretary of State's statement justifying the denial of the visa in accord with *McDonald* #1, the same plaintiffs instituted a second action, *McDonald* #2. District Judge Tenney however granted the government's motion for summary judgment, concluding that the Secretary of State had complied with the order of the Court in *McDonald* #1.

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[6] There are two decisions relating to *McDonald*, one by Judge Gagliardi, referred to as *McDonald #1*, sitting in a three-Judge Court, and a subsequent opinion by Judge Tenney, *McDonald #2* (S.D.N.Y 1974).

Judge Tenney quoted *Mandel*:

> "On the basis of facially legitimate and bona fide reason, the Courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Mandel* at 7.

Additionally, Judge Tenney noted that "in cases involving the exclusion and deportation of aliens, the government need only show that its reason for excluding or deporting an alien is 'facially legitimate and bona fide', even though the First Amendment rights of American citizens are implicated." (at pg. 14).[7]

POINT II

The appellant as a non-resident alien had no constitutional right to enter this country; nor did his wife have any constitutional right to have her husband admitted.

In an attempt to support the appellants' position, Burrafato has alleged several violations of his constitutional rights and those of his wife. Among those not already covered by Point I, *supra*, is the allegation that Antonina Burrafato has the right to have her husband kept in this country. This argument has been made on numerous occasions and has been rejected each and every time.

Judge Prettyman, in *Schwartz* v. *Rogers*, 254 F.2d 338 (D.C. Cir.), *cert. denied*, 357 U.S. 928 (1958) flatly rejected the argument wherein he stated:

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[7] The government has in fact complied with McDonald #1 prescription by advising the appellant which section of the statute he was denied a visa under, pursuant to 22 CFR § 42.130. (See affidavit of Peter A. Goldman, A.U.S.A. joint appendix, p. 9).

"Certainly deportation would put burdens upon the marriage. It would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which marriage created. The physical conditions of the marriage may change, but the marriage continues. Under these circumstances we think the wife has *no constitutional* right which is violated by the deportation of her husband (at 339)." [8] See also Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971); Enciso-Cardozo v. I.N.S., Dkt. #74-1083 (2d Cir. 1974)."

POINT III

The District Director of the Immigration and Naturalization Service has sole discretion of extending a voluntary departure date.

Regardless of this court's determination with regard to the prior acts of the Consular officials in Palermo, Italy, 8 C.F.R. § 244.2 provides that the District Director of the Immigration and Naturalization Service has the sole discretion to extend the voluntary departure date of an alien.[9]

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[8] Judge Weinfeld also noted that the same would be true for children. *Application of Amoury*, 307 F. Supp. 213 (S.D.N.Y. 1969).

[9] Authority to extend the time within which to depart voluntarily specified initially by a special inquiry officer or the Board is within the sole jurisdiction of the district director. A request by an alien for an extension of time within which to depart voluntarily shall be filed with the district director having jurisdiction over the alien's place of residence. Written notice of the district director's decision shall be served upon the alien, and no appeal may be taken therefrom.

The basis and purpose of the above-prescribed rules is to authorize a special inquiry officer to specify the time during which the respondent who has been granted voluntary departure may depart, fix the responsibility for extending initially au-

[Footnote continued on following page]

Since Burrafato was found to be an illegal alien pursuant to 8 U.S.C. § 1251(a)(1)(2), and deportable thereon, something appellant apparently does not contest, there appears to be no reason for judicial review. *Noel, infra;* see also *Bowes* v. *I.N.S.*, 443 F.2d 30 (9th Cir. 1971) (per curiam); *United States ex rel. Lu Pao Len* v. *Esperdy*, 423 F.2d 6, 8-9 (2d Cir. 1970).

In effect then, the plaintiff is now asserting rights and privileges he has allegedly received by entering this country illegally, that he would not have had as a non-resident alien. He requests a premium for illegal entry not available to non-resident aliens, just as was suggested in *Licea Gomez, infra*, note 3. Moreover his claim of procedural defects in the Consular decision have been corrected in accordance with *McDonald* #1, and are in accord with the statutory requirements of 8 U.S.C. § 1202(f).

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Brooklyn, New York
April 28, 1975.

Respectfully submitted,

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United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
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Assistant United States Attorneys,
of Counsel.

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thorized voluntary departure time with the district director, and permit the special inquiry officer to grant a stay of deportation in connection with a motion to reopen or reconsider filed in a deportation proceeding.

★ U. S. Government Printing Office 1975— 614—249—100

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 30th day of April 1975 he served a copy of the within

Brief for the Appellees

by placing the same in a properly postpaid franked envelope addressed to:

Fried, Fragomen & Del Ray, P.C.
515 Madison Avenue
New York, N. Y. 10022

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
30th day of April 19 75

OLGA S. MORGAN
Notary Public, State of New York
No. 24-7075785
Qualified in Kings County
Commission Expires March 30, 1977